Service Date: September 11, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Investigation into U S WEST Communications, Inc.'s, Compliance with Section 271(c) of the Telecommunications Act of 1996.	))))	UTILITY DIVISION DOCKET NO. D97.5.87 ORDER NO. 5982g

ORDER ON RECONSIDERATION OF ORDER COMPELLING DISCOVERY

U S West Communications, Inc. (USW), has filed a motion for reconsideration of the Public Service Commission's (PSC) June 29, 1998, Order No. 5982e. That order required USW to respond to certain joint intervenor data requests (i.e., discovery) in the above-entitled matter. USW's motion for reconsideration was briefed and argued orally before the PSC.

For reasons related to the nature of the discovery-requested information in issue, on August 6, 1998, the PSC appointed a special master to review the facts and arguments involved. On September 4, 1998, the appointed special master issued a report, in the form of a decision, to the PSC. The PSC has reviewed and considered the special master's decision and determines that it should be adopted as the PSC's order on USW's motion for reconsideration.

IT IS HEREBY ORDERED that the PSC adopts the September 4, 1998, Decision of Special Master on Discovery Issue (a copy of which is attached) as the PSC's Order on Reconsideration.

Done and dated this 9th day of September, 1998, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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DAVE FISHER, Chair

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NANCY MCCAFFREE, Vice Chair

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BOB ANDERSON, Commissioner

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BOB ROWE, Commissioner

_____
DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

DEPARTMENT OF PUBLIC SERVICE REGULATION
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IN THE MATTER of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271(c) of the Telecommunications Act of 1996.	))))	UTILITY DIVISION DOCKET NO. D97.5.87

DECISION OF SPECIAL MASTER ON DISCOVERY ISSUE

I. INTRODUCTION

1. On August 6, 1998, the Public Service Commission (PSC) issued Order No. 5982f in the above-entitled matter, appointing the undersigned as special master to decide a pending discovery issue. The issue involves discovery rules pertaining to the attorney-client privilege, ordinary work product, opinion work product, and non-testifying experts. In some instances, and the present instance is one of those, proper application of these rules requires a review of the discovery-requested information. The PSC's appointment of the special master, legally required or not, should reduce or eliminate any fact-finder tainting concerns that might exist if the PSC itself, as ultimate fact finder in the proceeding, were to review the materials directly, especially if following review of the information the PSC determined the information is not discoverable.

2. In general terms, the discovery issue is whether certain U S West Communications, Inc. (USW), operational support systems (OSS) studies or reports, documents related to those studies (e.g., memoranda, contracts), and other information pertaining to the studies (e.g., names of consultants engaged, methodologies applied in the studies) are discoverable. The discovery issue arises from data requests (the primary method of discovery in PSC contested case proceedings, ARM 38.2.3301) directed to USW by joint intervenors in the proceeding. With a few exceptions the data

requests in issue remain unanswered by USW. The disagreement as to whether USW must respond to the data requests appears to be primarily between USW and AT&T Communications of the Mountain States, Inc. (AT&T), one of the joint intervenors.

3. The issue is now on reconsideration before the PSC. In May 1998, and again in June 1998, AT&T filed a motion to compel USW responses to certain joint intervenor data requests, including the several data requests pertaining to USW's OSS studies and now in issue. On June 29, 1998, the PSC issued Order No. 5982e, granting AT&T's motion. USW has requested that the PSC reconsider Order 5982e insofar as it compels USW responses to the data requests pertaining to USW's OSS studies. Arguments on reconsideration, written and oral, have been submitted by USW and AT&T. USW has provided copies of the OSS studies and related documents for an *in camera* review by the special master.

II. DISCUSSION

A. FACTS

4. The PSC commenced the above-entitled matter for the purpose of obtaining information that might assist the PSC in its anticipated fact-finding and consultative role before the Federal Communications Commission (FCC), when USW files with that federal agency for a determination regarding whether USW's telecommunications system is open to and capable of administering local competition and whether USW should be allowed to compete in providing certain long distance telecommunications services. The status of USW's OSS will be an important consideration in the FCC's decision. Therefore, that status is an important consideration for the PSC, in regard to the PSC's anticipated role before the FCC. The status is also an important consideration for AT&T and other intervenors (many being competitive long distance carriers and potential competitors of USW as local exchange carriers) in their participation in the present proceeding before the PSC and in the future proceeding before the FCC.

5. USW is a public utility providing regulated telecommunications service in Montana and other western states, primarily as a local exchange carrier. USW is a corporation. It has an internal corporate structure that includes a law department staffed by attorneys who are employed by USW. Its internal corporate structure also includes other departments, with various functions, staffed by employees of USW. At times USW also engages attorneys and consultants through contract.

6. Several data requests (numbered JI-018, JI-048, and JI-049) directed to USW by the joint intervenors in the proceeding are involved in the issue now before the PSC. Data request JI-018 requests information related to USW's OSS studies, including dates, objectives, methodologies used, and results of certain interface testing. USW has, at least to some extent, responded to JI-018 regarding the objectives and methodologies aspects, but not otherwise. Data request JI-048 requests information related to USW's OSS studies, including the consultant engaged, date engaged, beginning and ending dates of the review, and a description of concerns, problems, and deficiencies identified during the studies. USW's response to JI-048 is an objection based on the attorney-client privilege and attorney work product. Data request JI-049 requests production of USW's OSS studies and related documents. USW's response to JI-049 is the same as its response to JI-048 (i.e., an objection).

7. USW has submitted affidavits of two attorneys employed, at all times relevant, by USW as members of USW's law department and assigned by USW to the projects which generated the discovery-requested information now in issue before the PSC. One attorney is Raymond C. Fitzsimons and the other is Laurie J. Bennett. The Fitzsimons affidavit references a third attorney, Laura Ford, also a member of USW's law department, who succeeded Fitzsimons in regard to one or more of the USW OSS projects.

8. It is possible that one or more of the above-named attorneys may act in more than one capacity on behalf of USW (e.g., the Fitzsimons affidavit discloses his job titles as "Assistant General Counsel – Litigation" and "Executive Director –

Productivity and Technology Management"). However, the above-named attorneys were acting in the capacity of attorneys for USW when involved with the information now in issue before the PSC.

9. Fitzsimons states (through affidavit) that he commissioned one performance study of USW's OSS system for the purpose of permitting legal analysis and rendering legal advice to USW and not for a purpose in the ordinary course of USW's business. He states the study was designated and maintained as confidential and provided only to USW's law department. Fitzsimons states that he directed the consultants' efforts in regard to the study and provided guidance to the consultants and the study therefore includes his thought processes, opinions, and conclusions. He also states that the study reflects and contains the mental impressions, conclusions, and opinions of the consultants retained. Fitzsimons states that he has used and relied on the study to render legal advice to USW. He states that the study has remained confidential.

10. Fitzsimons also states (through affidavit) that he was involved as USW's attorney regarding another OSS-related performance study commissioned by USW's Information Technologies Organization, members of which worked closely with him to defend pending claims. Fitzsimons states that this second study was also prepared solely for legal purposes and not for purposes in the usual course of USW's business. He states that he monitored the preparation of the study and reviewed and commented at the draft stages. He states that the study, one copy provided to him and one copy provided to USW's Information Technologies Organization, was designated and maintained as confidential and has remained confidential. He also states that the study reflects and contains the mental impressions, conclusions, and opinions of the consultants retained.

11. Bennett states (through affidavit) that she commissioned a consulting firm to perform analyses of § 271 of the federal Telecommunications Act of 1996, with the focus on OSS matters. She states that the purpose of engaging the firm was solely for

preparation of proceedings before federal and state authorities and anticipated litigation and was not for any purpose in the ordinary course of USW's business. Bennett states that she was the USW contact person for purposes of the study and had the principal role in communicating with the consultants. She states that she worked closely with the consulting firm to develop the scope of the project and the study therefore reflects her thought processes. Bennett states that the study and materials created have been designated and maintained as confidential. She states that the analyses in the study have been used to formulate legal advice. She states that the analyses reflect the mental impressions, thought processes, opinions, and conclusions of the consultants. Bennett states that the project produced several drafts, but no final study.

12. Fitzsimons's and Bennett's above-referenced consultant analyses, in the form of final or draft studies, and documents related to them are the information USW has submitted for *in camera* review. Factually, the studies and related documents are what USW claims them to be and what the USW attorney affidavits describe them to be. They are OSS studies, they are commissioned by USW, they are performed and prepared by consultants, and they and all parts of them, and for the most part each of their pages, are clearly marked in some fashion indicating that they are in anticipation of litigation and are attorney-client privileged. The studies include mental impressions, thought processes, opinions, and conclusions. The documents related to the OSS studies are contracts, memoranda, and other communications between or among USW, USW's law department, and the consultants engaged to perform the studies.

13. The affidavits, studies, and related documents evidence USW's law department being at the center of all study-related events – USW communicated to its law department requesting legal advice, USW's law department engaged the consultants on USW's behalf or directed USW's engagement of the consultants, the consultants performed the requested studies, USW's law department communicated with the consultants regarding development and direction of the studies, the consultants directed the product of their efforts to USW's law department, and USW's law

department communicated to USW regarding legal advice. Also regarding all study-related events the affidavits, studies, and related documents evidence that USW's law department and certain USW technical or consulting staff worked together, but, again, USW's law department remained at the center of the process. USW's technical and consulting staff, as well as the consultants engaged, provided subject matter expertise to USW's law department. The OSS studies and related documents include information USW's law department would find important, if not indispensable, in providing legal advice to USW.

14. The connection of the studies and related documents to actual (i.e., then pending) litigation is vague by way of USW's attorney affidavits. The information made available for *in camera* review strengthens the connection in regard to at least one of the studies. However, the connection of the studies and related documents to anticipated litigation is reasonably clear by affidavit and is fully supported through *in camera* review. Furthermore, given the subject matter of the information in issue and its direct relationship to substantial changes occurring in the telecommunications industry and regulation of that industry, it would seem unreasonable for USW to have anticipated anything less than a one hundred percent chance of litigation, of one kind or another. In any event, in regard to the purpose of the studies much more than a remote possibility of litigation existed at all times relevant.

B. LAW

Summary of Arguments

15. USW argues that long-established privileges and related legal rights allow persons to freely and confidentially consult with their attorneys, including as such consultations might involve the results of attorney investigations assisted by others providing subject matter expertise (e.g., consultants). USW argues that the PSC's order compelling USW's disclosure of the information in issue violates applicable privileges and related legal rights as those are provided by Montana law at: § 26-1-803,

MCA, the attorney-client privilege; Rule 26(b)(3), M.R.Civ.P., discovery and the attorney work product; and Rule 26(b)(4)(B), M.R.Civ.P., discovery and non-testifying experts.

16. AT&T argues that the PSC has fully and properly addressed all of the issues through Order No. 5982e (PSC order granting AT&T's motion to compel) and USW has not presented a factual or legal basis demonstrating that the PSC's action should be reconsidered. AT&T argues that the attorney-client privilege, to the extent it might be applicable, protects communications not the underlying facts, and, to the extent that such facts might be subject to protection as work product, recognized exceptions apply and USW must supply the requested information. AT&T also argues that consideration of facts related to the above-referenced rules pertaining work product and non-testifying experts demonstrate that the information in issue has not been generated by USW in a legal-advice, litigation-specific context, but merely in a regulatory duties and normal course of business context, where the rules do not apply.

Discovery and the Attorney-Client Privilege

17. Primarily as a matter of convenience the following discussion focuses on the law as it applies to the discovery-requested production (i.e., providing copies) of USW's OSS studies and related documents. Of course, more than production of these documents is in issue. Two of the data requests in issue (JI-018 and JI-048) do not request production, but only request general information pertaining to USW's OSS studies and related documents. Additionally, in its pursuit of reconsideration USW requests that the PSC issue an order of protection encompassing more than simply production of documents, also seeking protection from providing general information about the OSS studies and related documents in all pending discovery, future discovery, and at hearing. Discussion of these non-production aspects of the discovery in issue will follow discussion of the production aspect.

18. As another preliminary point, one important aspect of law regarding proper application of the attorney-client privilege to USW's production of the OSS

studies and related documents is that aspect which pertains to communications of persons who are integrally involved in the attorney-client relationship, but who are not the attorney and not the client. Primarily for convenience these other persons will be referred to in this discussion as "agents." This term of choice is merely intended to categorize the persons in a way that generally reflects that what they have done or communicated in regard to the attorney-client relationship is at the direction of or on behalf of the client or the attorney. The term is not intended to convey any other legal connotation (e.g., the laws of agency or principal and agent).

19. In contested case proceedings, which the above-entitled PSC matter is, Montana administrative agencies, including the PSC, must follow the common law and statutory provisions of evidence. § 2-4-612, MCA. PSC procedural rules acknowledge this. ARM 38.2.4201. Regarding discovery in PSC contested case proceedings the PSC has adopted Montana Rules of Civil Procedure pertaining to discovery. ARM 38.2.3301. Rule 26, M.R.Civ.P., one of the rules so adopted by the PSC, precludes discovery on privileged information, which includes information that is attorney-client privileged. Therefore, whether at the hearing stage or the discovery stage of PSC contested case proceedings, the law of attorney-client privilege applies.

20. Privileges, including the attorney-client privilege, may impede fact finding and access to the truth. The law recognizes this. *See generally* State ex rel., United States Fidelity and Guaranty Co. v. District Court, 240 Mont. 5, 12, 783 P.2d 911, 915 (1990). Nevertheless, the law recognizes a greater benefit in maintaining such privileges, including the attorney-client privilege. Support for this includes § 26-1-803, MCA (i.e., the privilege exists by statute). The attorney-client privilege enables an attorney to provide the best possible legal advice and encourage clients to act within the law. Palmer v. Farmers Insurance Exchange, 261 Mont. 91, 106, 861 P.2d 895, 904 (1993). With the privilege clients are free from consequences and apprehension in disclosing confidential information, encouraging them to be open and forthright with the attorney. *Id.* The privilege fosters the attorney-client relationship by ensuring that

attorneys are free to give accurate and candid advice without fear that the advice will later be used against the client. *Id.*, 261 Mont. at 107, 861 P.2d at 905.

21. Section 26-1-803, MCA, is Montana's statutory provision of evidence pertaining to the attorney-client privilege. It has two related parts, each having several elements. One part relates to examination of the attorney -- unless the client in the attorney-client relationship consents, examination of the attorney regarding communications made by the client to the attorney and advice made by the attorney to the client in the course of professional employment is prohibited. § 26-1-803(1), MCA. The other part relates to examination of the client -- except when voluntary on part of the client, examination of the client regarding such communications and advice (i.e., communications made by the client to the attorney and advice made by the attorney to the client in the course of professional employment) is also prohibited. § 26-1-803(2), MCA.

22. As the facts in the present case demonstrate, more persons than simply the attorney and the client can be integrally involved in the attorney-client relationship. Clients, attorneys, or both might retain agents (e.g., investigators, experts, consultants) to assist in analyzing a matter. USW's attorneys, on behalf of USW, have done so in the present case. Clients, particularly clients that are entities (e.g., corporations), might engage agents (e.g., employees, contractors) to assist the corporate attorney or other employees or contractors engaged by that attorney. To some extent USW's employees have been involved with development of the information at issue in the present case. Section 26-1-803, MCA, does not expressly address communications of agents involved in the attorney-client relationship. It speaks only in terms of "communications made by the client" and "advice given to the client [by the attorney]." However, the common law (i.e., case law, primarily from other jurisdictions, as there appears to be no Montana case law in which direct discussion of the point has been necessary) extends the attorney-client privilege to communications involving agents in some instances, but not in others. *See* discussion *infra* paras. 35-36.

23. In Order No. 5982e (order granting AT&T's motion to compel) the PSC determined that the attorney-client privilege has limited scope and provides only a qualified immunity. *Id.*, paras. 9 and 10. In regard to this the PSC made several determinations, including: the product of a consulting expert is not privileged merely because an attorney has retained the consulting expert or supervised the consulting expert in preparation of the product; the limited scope of the privilege prevents a party from asserting it for improper reasons merely because the attorney hired or supervised the expert; the privilege cannot be created merely by transmitting information to an attorney; and information that cannot be accurately described as legal advice is not protected by the privilege. *Id.*

24. The PSC's determination relating to the product of a consulting expert not being privileged merely because an attorney has retained the consulting expert or supervised the consulting expert in preparation of the product, if intended by the PSC to mean that there must be more involved than the attorney's mere hiring or supervising of a consultant, could be correct. However, the facts regarding the USW attorneys' relationships with the consulting experts in the present matter demonstrate that USW's attorneys did more than merely hire or supervise the consultants. The USW attorneys not only engaged the consultants or directed USW's engagement of the consultants and supervised the consultants, but also monitored progress or the product, contributed to the product, and relied on the subject matter expertise of the consultants in development of legal advice, all in a context designated and maintained as confidential and with the stated expectation that the efforts and the products were to be attorney work product and attorney-client privileged.

25. In support for its determination that the privilege cannot be created merely by transmitting information to the attorney the PSC cited to Clark v. Norris, 226 Mont. 43, 734 P.2d. 182 (1987). Clark, a medical malpractice case, pertains in part to an overruled evidentiary objection based on the attorney-client privilege. The objection had sought protection of a client-prepared incident report. On appeal it was determined

that the purpose of the report was not clear and the confidentiality of the report was not demonstrated and "the attorney-client relationship does not automatically give rise to immunization of every piece of paper a [client] files with its attorney" and "[the] privilege cannot be created in a subject matter merely by transmitting it to an attorney." *Id.*, 226 Mont. at 50-51, 734 P.2d at 187. However, it was further expressed that the existence of the privilege as it might relate to information transmitted to an attorney (e.g., the "piece of paper" or the "subject matter" referenced above) is to be determined by the purpose underlying transmittal of the information and, if the purpose is for confidential transmittal to the attorney, it may be privileged. *Id.*

26. In Clark the client in the attorney-client relationship is a hospital. Hospitals are entities (e.g., corporations), not individuals. Actions of entities, in most cases, can be accomplished only through agents. In Clark the client, through its agents (i.e., employees), made the communication in issue (i.e., the incident report). In the matter now before the PSC the client, through its agents (i.e., contractors), is also making the communication in issue (i.e., the OSS studies). The fact that USW's law department engaged or directed the engagement of the consultants does not, in any legal sense, make the consultants something other than contractors of USW. Unlike in Clark, the present record is clear that the OSS studies and related documents were for confidential transmittal to the attorney (the fact that one of the two copies of the second OSS report referenced in Fitzsimons' affidavit was delivered to USW staff working on the project, does not diminish the confidentiality of the report, all other factors considered). There is no reason to distinguish between client communications through employee agents and client communications through contractor agents. The Clark holding that information confidentially transmitted to the attorney may be privileged applies and the communications in issue are privileged, at least insofar as the Clark case is concerned.

27. In support for its determination that the information in issue must be legal advice for the privilege to apply the PSC cited to Kuiper v. District Court, 193 Mont. 452,

632 P.2d 694 (1981). Kuiper, a civil action relating to design of a tire rim that exploded and caused injury, involves review of a trial court's grant of a motion to compel responses to requests for admission of the genuineness of documents, over objections in part based on the attorney-client privilege. What can be extracted from the opinion as the law of attorney-client privilege, and what Kuiper applies in an exhibit-by-exhibit analyses of the documents there in issue, is that "[the] privilege only applies statutorily in Montana to communications made by a client to his attorney and legal advice given in response thereto, during the course of professional employment. Section 26-1-803, MCA." Kuiper, 193 Mont. at 461, 632 P.2d at 699. The statute's "advice" is referred to by the court as "legal advice," the adjective probably implied by context, but a helpful clarification in any event. However, Kuiper does not define "legal advice" and Kuiper's exhibit-by-exhibit analysis of documents there in issue sheds no dispositive light on the legal advice aspects of the information in issue before the PSC.

28. The Kuiper holding regarding the privilege only protecting advice that is legal advice needs to be considered only if USW's OSS studies and related documents are not properly client communications (*see* discussion of Clark, *supra*, paras. 25-26), which obviously need not be legal advice. However, if it were the case that the consultants' communications (i.e., the OSS studies) to USW's attorneys are not privileged client communications, the facts demonstrate that they are legal advice, at least a combination of: (a) legal advice, because USW's attorneys were integrally involved in the development of them; and (b) relevant nonlegal considerations (i.e., subject matter expertise) contributing to the development of legal advice. In Palmer, *supra*, 261 Mont. at 109, 861 P.2d at 906, the court maintained that the attorney-client privilege is not lost merely because the attorney communication contains relevant nonlegal considerations. As far as the Kuiper opinion is concerned, USW's OSS studies and related documents legitimately fall within the category of advice that is legal advice.

29. USW argues that the attorney-client privilege extends absolute immunity

(i.e., USW contests the PSC's determination that the privilege is a qualified immunity). USW's assessment is correct, if USW means when the privilege applies, the privilege extends absolute immunity (i.e., when it applies, it is not of limited scope or qualified immunity). In support of its argument USW cites to several cases, including Palmer, *supra*, 261 Mont. 91, 861 P.2d 895, and United States v. Rowe, 96 F.3d 1294 (9th Cir. 1996).

30. In Palmer, a case involving insurance bad faith, the trial court had compelled an insurer to produce information claimed to be attorney-client privileged, basing its action on a showing of need by the insured. Appeal resulted in a reversal. A showing of need may overcome an immunity from discovery given to an attorney's work product, but it does not overcome immunity based on the attorney-client privilege. *Id.*, 261 Mont. at 112, 861 P.2d at 908. Palmer applied the policies underlying the privilege (*see* discussion *supra*, para. 20) to the issues presented there, most discussion of which (e.g., first-party versus third-party bad faith cases, waiver, timing of objections) is not pertinent to the issues presently before the PSC. In relevant part, Palmer does reiterate the Kuiper holding that, absent a voluntary waiver or an exception, the privilege applies to all communications from the client to the attorney and to all advice given to the client by the attorney in the course of the professional relationship. Palmer, 261 Mont. at 108-109, 861 P.2d at 906.

31. Rowe, is a case involving the handling of client funds by an attorney in a law firm and the attorney-client privilege as it might extend to the law firm's investigation of that attorney. An aspect of the Rowe decision that is arguably relevant to the issue now before the PSC is the court's determination that fact-finding which pertains to legal advice is "professional legal services" (referring to an earlier determination in Rowe that the attorney-client privilege can exist only after a client consults an attorney for the purpose of facilitating the rendition of "professional legal services"), not ordinary business purposes. Rowe, 96 F.3d at 1297. Rowe (citing to other cases) indicates UpJohn, *infra*, has been interpreted as precluding any finding that fact gathering by

attorneys on behalf of a corporate client can be for business, not legal, purposes. *Id.* Regarding the issues now before the PSC USW's engagement of the consultants is for the purpose of fact finding and the context pertains to legal advice.

32. In response, AT&T argues that the attorney-client privilege is subject to carefully crafted limitations, one being that § 26-1-803(1), MCA, protects communications only, not underlying facts. Although "carefully crafted limitations" is a debatable description, AT&T is correct in concept – not everything done by clients, attorneys, or agents in the attorney-client relationship is privileged. In support of its arguments AT&T cites to UpJohn v. United States, 449 U.S. 383 (1981).

33. UpJohn is an opinion of the United States Supreme Court, cited in several of the cases referenced above. UpJohn discusses the attorney-client privilege, particularly as that privilege relates to corporate clients and attorneys. Much of what UpJohn discusses regarding the corporate setting is not related to matters in issue before the PSC. At one point UpJohn does discuss corporate employees and the attorney-client relationship, essentially holding that a common legal theory up to that point, confining application of the privilege to communications of the corporate control group (i.e., management), is contrary to the purpose of the privilege and the privilege should extend to all corporate employees. *Id.*, 449 U.S. at 396-397. At another point where UpJohn is arguably relevant, AT&T argues that UpJohn articulates the identical view on the scope of the privilege as does Montana's statute -- the privilege protects the communications not the underlying facts disclosed by others to the attorney. AT&T's assessment is accurate, as UpJohn does state the privilege protects communications (449 U.S. at 395) and § 26-1-803, MCA (attorney-client privilege), does state the privilege protects communications.

34. AT&T's referenced "communications not the underlying facts" concept naturally extends to communications of agents involved in the attorney-client relationship, including agents who are expert consultants retained by the attorney or the client to assist in rendering legal advice. However, the point of the "communications

not the underlying facts" concept is not that communications must be disclosed if they contain facts, it is that facts cannot be concealed merely because they are included in a communication qualifying as privileged. *See generally*, UpJohn, 449 U.S. at 395-396. The communication itself, if privileged, remains privileged, the underlying facts do not. The correct avenue towards discovery, if not barred by other rules, is to direct discovery at the facts, not the communications. Two of the joint intervenor data requests now in issue (JI-018 and JI-048) are properly directed at the facts.

35. USW argues that the privilege extends to reports provided to attorneys by others, citing to several cases, including United States v. Kovel, 296 F.2d 918 (1961). In Kovel an accountant employed by a law firm to assist in tax cases refused to testify before a grand jury, asserting attorney-client privilege. The accountant was jailed for contempt. On appeal the court discussed the application of the privilege to those who are not attorneys, but who are engaged by attorneys to assist in matters. The court discussed the positions of several legal commentators on the subject and, in part arguably relevant to the issue now before the PSC, concluded that the privilege applies to communications made in confidence to those who are not attorneys, but are engaged by attorneys to assist, if done for the purpose of obtaining legal advice from an attorney. Kovel, 296 F.2d at 922. It is unclear whether AT&T disputes what Kovel holds regarding communications, but AT&T argues that Kovel is inapplicable, as neither Kovel nor any other case cited by USW on the particular point extends the privilege beyond the communications to encompass underlying facts, data, and analysis contained in the reports of those assisting the attorneys. USW replies that a consultant's report to an attorney is a communication.

36. AT&T acknowledges that the privilege can so extend, but only under limited circumstances (e.g., agent retained by the attorney, resulting report integral to legal advice, not in the ordinary course of business), which AT&T argues are circumstances not existing in the present matter before the PSC. AT&T argues that the privilege does not extend to certain reports provided to attorneys by others, citing to

Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377 (1994). In Southern Bell the court was reviewing Florida PSC action (in four investigative proceedings consolidated with a rate case) directing telephone companies to disclose certain documents claimed to be privileged. At issue (in one of the investigative proceedings) were telephone company audit department investigative audits, requested from company staff by company legal counsel. The court simply concluded, without discussion, that such audits, which were systematic analyses of data, cannot be considered the type of statement traditionally classified as a communication for the purposes of the attorney-client privilege. *Id.*, 632 So.2d at 1384. USW argues Southern Bell does not apply to the issue now before the PSC because, rather than involving mere systematic analyses of data by employees, the information in issue before the PSC involves opinions and analyses of outside experts and the mental impressions and legal theories of attorneys. USW is correct. The circumstances underlying the issues now before the PSC are distinct from those in Southern Bell.

37. From all arguments presented and the discussion above, the proper legal conclusion is that USW's OSS studies and related documents are attorney-client privileged. The OSS studies were developed to assist in rendering legal advice, the studies have been maintained as confidential for that purpose, and the studies were confidentially transmitted to the attorneys. To the extent the studies are not communications, they are legal advice as they include legal advice and are otherwise comprised of relevant nonlegal considerations contributing to the development of legal advice. The studies have been developed in the context and course of professional employment of legal counsel and whether properly deemed client communications, attorney legal advice, or both in that context, they can be nothing else. The studies are therefore privileged under § 26-1-803, MCA, and case law interpreting that statute. The purpose of the privilege is upheld by so concluding. USW need not produce the OSS studies or documents related to those studies. The proper legal conclusion also includes that the privilege extends only to the actual OSS studies and the documents

related to those studies, not the facts underlying them. The attorney-client privilege protects communications, not the facts underlying the communications.

38. As previously indicated, the above discussion focuses on the law as it applies to USW's production of the OSS studies and related documents, but more information is involved. Data request JI-018 requests the dates of USW OSS interface testing, the objectives of the tests, the methodologies used in the tests, and the results of the tests. These requests primarily pertain to facts underlying the studies. Data request JI-048 requests the identification of consultants retained for the studies, inquires about dates, and requests an identification of what the studies discovered (i.e., the results, concerns, problems, and deficiencies identified in the studies). These requests also primarily pertain to facts underlying the studies. Such facts are not privileged. The attorney-client privilege protects communications, not the underlying facts. Unless protected from disclosure by other applicable rules (*see* discussion of work product and non-testifying witnesses *infra*, paras. 39-48), USW must respond to data requests JI-018 and JI-048 (i.e., the non-production data requests).

Discovery, Work Product, and Non-Testifying Experts

General

39. As determined above, the joint intervenors are not entitled to USW's OSS studies or the documents related to those studies. The studies and related documents are attorney-client privileged. However, unless protected from disclosure by other provisions of law, USW must respond to all parts of JI-018 and JI-048 (i.e., the non-production data requests). USW's responses, if required, would undoubtedly be based on the studies, but as underlying facts rather than communications. There are other provisions of law arguably applicable to the underlying facts. These provisions are in Rule 26, M.R.Civ.P., and are categorized as rules pertaining to "trial preparation" (i.e., information developed or obtained in anticipation of litigation).

40. AT&T argues that USW has not demonstrated that the data requests in

issue pertain to materials prepared or witnesses engaged in anticipation of litigation. If such were the case the prohibition against discovery on work product and non-testifying experts would not apply and the circumstances allowing exceptions to that general prohibition would not need to be considered. The facts do not support AT&T's position. USW's OSS studies and the documents related to those studies were prepared in anticipation of litigation (*see* discussion *supra*, para. 14).

41. Rule 26 has been adopted by the PSC for discovery purposes. ARM 38.2.3301. Rule 26, implying that information developed or obtained in anticipation of litigation is generally not discoverable, provides for special circumstances under which it is. So long as certain conditions exist, Rule 26(b)(3) permits discovery of material prepared in anticipation of litigation by a party, including that prepared by or for the party's attorney. The information at which the rule is directed is commonly referred to as work product. So long as certain requirements are met, a second rule, Rule 26(b)(4)(B), allows discovery of facts known and opinions held by experts retained in anticipation of litigation or preparation for trial, but not expected to be called as witnesses. Discovery under these rules does not override any privilege. Both provisions require that the material sought be otherwise discoverable under Rule 26(b)(1). Rule 26(b)(1) expressly precludes discovery of privileged material. Because USW's OSS studies and documents related to those studies are privileged, they remain undiscoverable.

Work Product

42. In order to obtain discovery of work product that is otherwise discoverable, Rule 26(b)(3) requires a showing that the party seeking discovery has a substantial need of the materials in the preparation of its case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. If the showing is made, the rule requires that the court (i.e., the PSC in the present instance) shall protect against disclosure of the mental impressions, conclusions, or legal theories

of an attorney or other representative of a party concerning the litigation. Because of this required protection, there are essentially two types of work product, ordinary work product (i.e., that which is not mental impressions and so forth) and opinion work product (i.e., that which is mental impressions and so forth). As is the case with the attorney-client privilege, work product protection does not extend to facts. By its own terms the work product rule applies to documents and tangible things, not facts concerning creation of the work product or facts within the work product. 6 James Wm. Moore et al., Moore's Federal Practice para. 26.70(2)(b) (3d ed., 1997).

Ordinary Work Product

43. The present discussion on the issues before the PSC has already reached the point, through application of the attorney-client privilege, where the tangible things and documents in issue (i.e., the communications) are not discoverable and the facts underlying the tangible things and documents are discoverable. Therefore, ordinary work product need not be discussed (*see* discussion *supra*, para. 42, i.e., work product only protects materials, not facts). Under the circumstances surrounding the issues now before the PSC, nothing about ordinary work product would either add to or subtract from the effect of the previous discussion on attorney-client privilege.

Opinion Work Product

44. The discussions of work product and ordinary work product apply to opinion work product as well, except there are two reasons justifying at least some further discussion. One is that the material protected by the attorney-client privilege is also protected as opinion work product. The other is that some of the information (i.e., facts underlying the communications) not protected by the attorney-client privilege may be protected as opinion work product. The standard for obtaining opinion work product is not the rule-referenced "substantial need" and "undue hardship" applicable to ordinary work product. The rule itself, Rule 26(b)(3), can easily be interpreted as an

absolute bar to obtaining opinion work product (i.e., "the court shall protect against disclosure of the mental impressions, conclusions, or legal theories of an attorney or other representative of a party concerning the litigation"). The Montana Supreme Court has not held that the provision is an absolute bar, but it has endorsed the statement "opinion work product enjoys nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances" (citations omitted). Palmer, *supra*, 261 Mont. 91, 116-117, 861 P.2d 895, 911 (1993). "Rare and extraordinary circumstances" means that the mental impressions actually are the issue in the case. *Id*. Mental impressions are not the issue in the present case before the PSC and the required rare and extraordinary circumstances therefore do not exist. Given this, if it were the case that USW's studies and related documents are not attorney-client privileged (which they are) they would be protected as opinion work product because the studies and related documents are mental impressions, conclusions, opinions, or legal theories of USW's attorneys or other representatives. Additionally, because the requisite showing for access to the information has not been made, to the extent that the remaining information in issue (i.e., information requested by the non-production data requests) not protected by the attorney-client privilege amounts to opinion work product (i.e., a mental impression, conclusion, opinion, or legal theory of USW's attorneys or other representatives) it is protected as opinion work product and is not discoverable.

Non-Testifying Experts

45. The final "trial preparation" rule arguably applicable is Rule 26(b)(4)(B). It pertains to discovery of facts known and opinions held by experts retained in anticipation of litigation or preparation for trial, but not expected to be called as witnesses. As indicated above, the rule does not override the attorney-client privilege. In order to obtain discovery of the facts known and opinions held by non-testifying experts there must be exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts and opinions on the same subject by other

means. The rule extends to the identity of the witness as well as the facts known and opinions held by the expert. Burlington Northern v. District Court, 239 Mont. 207, 215, 779 P.2d 885, 890 (1989). The meaning of the rule-referenced "exceptional circumstances" and "impractical to obtain" has not been judicially determined in Montana. However, the rule is identical to the federal rule on the same subject.

46. AT&T argues that the protection provided by Rule 26(b)(3) is subject to Rule 26(b)(4)(B). If AT&T's argument is intended to mean that discovery under Rule 26(b)(4)(B) is not affected by the provision in Rule 26(b)(3) regarding protection of mental impressions, conclusions, opinions, or legal theories, it is correct only in regard to the experts. The introductory provision of Rule 26(b)(3) (i.e., "[s]ubject to the provisions of subdivision (b)(4) of this rule") does not limit the second sentence in Rule 26(b)(3), regarding mental impressions, conclusions, opinions, or legal theories of attorneys. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 594 (3rd Cir., 1984).

47. AT&T argues that relevant federal decisions have established at least two situations satisfying the exceptional circumstances standard: where the object or condition is no longer observable by an expert of the party seeking discovery; and where it may be possible to replicate discovery but the costs would be judicially prohibitive. Bank Brussells Lambert v. Chase Manhattan Bank, 175 F.R.D. 34, 44 (S.D.N.Y., 1997). AT&T argues that the first instance exists where access is refused to the location necessary to replicate the efforts of the non-testifying expert. *Id.* AT&T argues that the situation in the present case before the PSC makes these conditions applicable. AT&T argues that it has had no opportunity to observe and test USW's OSS functions, that it has neither been granted access to the functions nor offered the same level of cooperation from USW employees as USW consultants have obtained, and it does not have the intimate knowledge necessary to conduct the tests. There is also the question of whether the costs for one or more of the intervenors would be judicially prohibitive. The facts do not show that USW has denied AT&T access. The facts do not show that the costs of replicating discovery would be judicially prohibitive.

48. Regarding non-testifying experts, AT&T also argues that to the extent USW's testifying experts have relied on, seen, or used the opinions or conclusions of USW's non-testifying experts USW has opened the door to discovery. AT&T is correct in concept. Documents obtained from a retained non-testifying expert and provided to an expert designated as a testifying witness become discoverable. 6 James Wm. Moore et al., Moore's Federal Practice para. 26.80(2) (3d ed., 1997). However, the facts indicate that the documents have remained confidential. There is no indication that the documents have been provided to any testifying witness. Furthermore, absent circumstances amounting to a waiver, if the documents were so provided the attorney-client privilege may remain applicable, if the testifying witnesses, like the non-testifying witnesses in this matter before the PSC, are in a privileged attorney-client relationship.

III. DECISION

49. USW's OSS studies and documents related to those studies are communications between attorney and client, transmitted in the context of a professional relationship, and are protected by the attorney-client privilege. USW need not produce copies of the OSS studies or the documents related to those studies. However, the attorney-client privilege protects the actual communications, not the facts underlying those communications. Therefore, unless the facts underlying the communications are protected through other means, USW could be required to respond to all joint intervenor data requests directed at the facts underlying the OSS studies and the documents related to those studies. Other means of protection applicable to the facts underlying the communications have been considered. Ordinary work product is one of them. However, in effect similar to the attorney-client privilege, it protects only documents and tangible things, not the underlying facts. So, nothing would be gained by discussing it. Opinion work product is another. It is applicable and, in regard to the facts underlying the communications, it extends protection to any mental impressions, conclusions, opinions, and legal theories of USW's attorneys or

other representatives. In providing facts underlying USW's OSS studies and related documents, USW need not provide mental impressions, conclusions, opinions, or legal theories of its attorneys or other representatives. Non-testifying experts is another means of protection of facts underlying communications. The standards which allow an exception to the general prohibition on discovery of trial preparation, non-testifying experts, has not been met. Therefore, what is not discoverable in this case includes USW's OSS studies and related documents and any facts underlying the studies or related documents which qualify as mental impressions, conclusions, opinions, or legal theories of USW's attorneys or other representatives, or which qualify as facts known or opinions held by the non-testifying experts, and the identity of the non-testifying experts. What is discoverable is all other facts underlying the communications. For each intervenor data request in issue, item-by-item, proper application of this decision is as follows.

a. Data request JI-018(a) inquires as to the dates of USW OSS interface testing. Data request JI-048(b) and (c) inquire as to the dates of USW agreements with the consultants performing the studies and the dates of the resulting studies. The dates are facts underlying privileged communications and ordinary work product. As such they are not protected under the attorney-client privileged or as ordinary work product. The dates do not qualify as opinion work product or trial preparation facts exclusively known to non-testifying experts. USW must supply the requested dates.

b. Data request JI-018(b) inquires as to the objectives of the USW OSS interface tests. Data request JI-018(c) inquires as to the methodologies used in the tests. It appears that USW has attempted to respond to these inquiries. To the extent USW has not fully or clearly responded, these inquiries also pertain to facts underlying privileged communications and ordinary work product, and are therefore not protected under the attorney-client privileged or as ordinary work product. It is doubtful, but nevertheless possible, that the requested objectives and methodologies could include opinion work product and might be exclusively known to non-testifying experts. USW

must supply the requested information, but in a format that does not include the mental impressions, conclusions, opinions, or legal theories of its attorneys or other representatives, or facts exclusively known or opinions held by non-testifying experts.

c. Data request JI-018(d) inquires as to the results of the tests. Data request JI-048(d) requests identification of what the studies discovered. These requests also pertain to facts underlying privileged communications. Such facts are not privileged. However, it is more than probable that the requested results and identification of what the studies discovered will include opinion work product and facts known and opinions held by non-testifying experts. USW must supply the requested information, but in a format that does not include the mental impressions, conclusions, opinions, or legal theories of its attorneys or other representatives.

d. JI-048(a) requests identification of the consultants. The names of the consultants are not discoverable and USW need not provide them.

e. JI-049 requests production of documents related to USW's OSS studies. The documents are attorney-client privileged and USW need not produce them.

Dated this 4th day of September, 1998.

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Martin Jacobson
PSC-Appointed Special Master